

DOCUMENT RESUME

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[Protests re First Article Testing, Price, Contractor Responsibility and Performance, and Revision of Specification].
B-186133. April 27, 1977. 10 pp.

Decision re: Charles J. DiSpenza & Associates; by Robert P. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Defense Supply Agency: Defense General
Supply Center, Richmond, VA; American Laundry Machinery;
Department of the Army: Army Natick Research and Development
Center, MA.

Authority: 29 Comp. Gen. 211. 37 Comp. Gen. 190. 37 Comp. Gen.
192. 52 Comp. Gen. 265. 53 Comp. Gen. 225. 53 Comp. Gen.
227. 53 Comp. Gen. 591-592. 55 Comp. Gen. 494. 49 Comp. Gen.
211. 53 Comp. Gen. 586. 52 Comp. Gen. 285. 52 Comp. Gen.
289. B-185890 (1976). B-183730 (1976). B-186659 (1976).
B-179674 (1974). B-176425 (1972). B-167585 (1970). B-155827
(1965). B-183131 (1975). A.S.P.R. 2-404.1(b)(1),
2-404.1(b)(ii).

Protest was made to the cancellation of two solicitations by the Defense Logistics Agency for ironers. Waiver of requirement for first article testing was within discretion of the procuring agency. Lack of testing price in the bid did not require rejection. Contractor's responsibility and performance are for agency determination. Only bid offering ironer at reasonable price and meeting essential requirements was acceptable, though it did not comply with specification subsequently found nonessential. Specification revision was not a compelling reason to cancel solicitation. (DJB)

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Invitation for Bids (IFB) No. DSA 400-76-B-1919 (IFB -1919) was issued on December 9, 1975, by the then Defense Supply Agency (now the Defense Logistics Agency (DLA)), Defense General Supply Center, Richmond, Virginia, for one large roll flatwork ironer. IFB No. 400-76-B-3243 (IFB -3243) was issued on February 12, 1976, by the same agency for two of the same type ironers, and related items. Charles J. Dispenza & Associates (Dispenza) and American Laundry Machinery (ALM) were the only bidders on both solicitations.

The bid prices for the ironers under IFB -1919 were:

Dispenza	\$51,115
ALM	43,759

These prices take into account the waiver by the contracting officer of the requirement for first article testing. Since Dispenza's bid price for the testing was \$400 and ALM's was \$15,000, Dispenza would have been the low bidder, absent the waiver.

The bids received in response to IFB -3243 were:

	<u>Item 1</u>	<u>Item 2</u>	<u>Item 3</u>
Dispenza	\$39,393	\$40,404	\$10
ALM	45,489	46,754	N/C

The specifications in both invitations required that the ironer have a detachable hand crank for operating the machine in reverse direction. In this regard, Dispenza submitted cover letters with each of its bids, stating that because of the design of its machine it could not provide a hand crank, but that the crank was unnecessary as the machine could be reversed by other means. Because of these statements, the contracting officer initially determined that both of Dispenza's bids were nonresponsive. Dispenza became aware of this and protested to DLA.

Subsequently, the United States Army Natick Research and Development Center (Natick) evaluated the specification, determined that the hand crank and reversing action were not essential to meet the Government's performance needs, and took steps to revise the specification to require only that a means of removing sheets without electrical power be provided. While this was occurring, the contracting officer determined that because the specifications were

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being revised both solicitations should be canceled and resolicited using the revised specifications. Dispenza and ALM were notified of this action by letters dated June 25, 1976.

By letter filed in our Office July 14, 1976, Dispenza protests the cancellation of both solicitations on the grounds that since the hand crank specification was unnecessary to meet the performance requirements of the Government, its bid was responsive even without providing the crank, and that, consequently, there was no compelling reason to cancel the IFB's and resolicit. In addition, Dispenza contends that ALM's bid on IFB -1919 was nonresponsive because ALM did not include the price for first article testing in its price for the ironer as the IFB called for. Further, Dispenza protests the determination that ALM was low bidder, alleging in this regard that the first article test waiver was improper.

By letter filed in our Office on November 4, 1976, Dispenza also alleges that ALM's bids under both invitations were nonresponsive because the hand cranks on ALM's ironers do not satisfy the required reversing function. In other correspondence, Dispenza complains of biased testing of its ironers by the Veterans Administration (VA) in connection with a previous procurement.

IFB -1919

The contracting officer first determined that Dispenza's bid was nonresponsive because Dispenza had stated in its cover letter that it could not provide a hand crank as required by the specification. When Natick determined that the hand crank was not essential and that the specification should be revised, the contracting officer, as noted supra, was disposed to cancel the IFB and resolicit. The contracting officer was relying in this regard on Armed Services Procurement Regulation (ASPR) § 2-404.1(b)(ii) (1975 ed.) which provides in pertinent part:

"When it is determined prior to award but after opening that the requirements of 1-1203 (relating to the availability and identification of specifications) have not been met, the invitation for bids shall be canceled. Invitations for bids may be canceled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that--

* * * * *

specifications have been revised;

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However, DLA ultimately took the position, as stated in its report to our Office dated October 20, 1976, that the IFB should be reinstated, and an award made to ALM. In support of this, DLA cited 49 Comp. Gen. 211 (1969), where we stated:

"Although revision in specifications is, in some instances, a 'compelling reason' to cancel an invitation, it would seem that cancellation should be limited to instances in which an award under the original specifications would not serve the Government's actual needs."

DLA's report expressed the view that award under the original specifications would be appropriate because it would serve the Government's needs, because ALM's bid was low and responsive, and because Dispenza's bid was neither low nor responsive

Since Dispenza has not objected to the reinstatement of this IFB, we believe that the only issues to be resolved concern the waiver of the first article testing requirement and the responsiveness of ALM's bid.

ALM was the apparent low bidder, with waiver of the first article testing requirement. Dispenza contends, however, that DLA's decision to waive this requirement was improper. In allowing waiver of first article testing DLA relied upon results of a 1971 test of an ALM ironer by VA. Dispenza contends that this test was of an ironer furnished under VA specification X-1421, which, Dispenza believes, is far different from Federal specification 00-I-1874 used in IFB -1919. IFB -1919's specification requires ironing performance of 910 sheets per hour, and Dispenza asserts that Government personnel at several VA hospitals have stated that the ALM 5 roll-ironer cannot iron 900 sheets per hour. Dispenza regards the test results of ALM's ironers as too controversial to support waiver of first article testing. Further, Dispenza has furnished a copy of a November 17, 1976, letter to it from a supply official in VA's Department of Medicine and Surgery. This letter states that (1) VA has never purchased an ALM ironer under Federal specification 00-I-1874; (2) VA therefore cannot attest to the capability of the ALM ironer to satisfy a 900-sheets-per-hour requirement; (3) VA's X-1421 specification and Federal specification 00-I-1874 are not identical; and (4) VA does not feel that the test results under specification X-1421 should be used as a basis for demonstrating compliance with Federal specification 00-I-1874.

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A decision whether to grant a waiver of first article testing is a matter of administrative discretion, to which we will not object in the absence of a clear showing of arbitrary or capricious action. See Joseph Pollak Corporation, B-185890, June 29, 1976, 76-1 CPD 418; Kan-Du Tool & Instrument Corporation, B-163730, February 23, 1976, 76-1 CPD 121, and decisions cited therein. The record in the present case shows that the 1971 test found that an ALM 5-roll ironer met the requirements of VA specification X-1421, including a 900-sheets-per-hour requirement. While the X-1421 and 00-I-1874 specifications may not be identical in all respects, they do appear to contain a number of similar or closely comparable performance requirements, such as number of sheets per minute, roller speed, and moisture levels before and after ironing. Though the VA correspondence cited by Dispenza indicates there may be current disagreement as to how much weight should be accorded to the 1971 test results, we believe that the results do constitute objective evidence supporting the contracting officer's determination to waive first article testing. Therefore, we do not think that the contracting officer's action has been clearly shown to be arbitrary or capricious.

Dispenza further argues that ALM's bid was nonresponsive because the price for first article testing was not included in the price quoted for the ironers, as specified by the IFB, but was listed separately. In Abbott Power Corporation, B-186659, August 26, 1976, 76-2 CPD 193, we stated, quoting Chemical Technology, Inc., B-179674, April 2, 1974, 74-1 CPD 160, that:

"* * *[A] deficiency which is a matter of form, or which constitutes some immaterial deviation from the exact requirements of the specification which would not affect either the price, quantity or quality of the article offered, is a minor informality which may be waived or cured. 37 Comp. Gen. 190, 192 (1957); 52 Comp. Gen. 285 (1972). What constitutes a minor deviation is dependent on the particular circumstances present in each case. B-176425, October 18, 1972."

In Abbott we held that the failure to separately price items for first article test reports as required by the IFB was a minor informality because, under the circumstances present, the successful bid clearly obligated the bidder to furnish the test reports. In the instant case, we find that ALM's failure to include the first

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article testing price in the price quoted for its ironers was a minor deficiency of form which does not require a finding of nonresponsiveness.

Dispenza has also argued that ALM's \$15,000 price for first article testing was not realistic. However, bidders may price their bids as they see fit, consistent with the terms of the solicitation (53 Comp. Gen. 225, 227 (1973)) and Dispenza has not pointed to any provision of the IFB which was contravened by ALM's first article testing price. Dispenza also questions whether ALM was offering one size ironer with first article testing and a different size ironer if first article testing was waived. In this regard, examination of the ALM bid does not indicate that ALM was attempting to make alternate offers of this kind.

In its letter to our Office dated October 31, 1976, Dispenza alleges that it has examined ALM ironers installed at the Walter Reed Fabric Care Facility in Maryland, and discovered that the hand cranks on the ironers do not reverse the machines, but rather lift the rolls from the heated surface. Dispenza asserts that since ALM's ironers cannot meet the reversing specification, ALM's bid must be rejected as nonresponsive.

In this regard, the IFB contemplated that bidders would offer their commercial products, with appropriate modifications, and established the hand crank requirement referred to previously. Unlike Dispenza's bid, there is no indication that ALM's bid contained any statements taking exception to the hand crank requirement. ALM's bid, then, was an offer to furnish a machine satisfying the Government's stated requirements, including the hand crank function. In this light, even if it were established that ALM machines previously furnished to the Government do not satisfy the hand crank function, there is no basis to conclude that ALM's bid in the present procurement is nonresponsive. Rather, the question of whether ALM will in fact deliver a machine conforming to the specifications relates to ALM's responsibility and to matters of contract administration. Our Office no longer reviews affirmative determinations of responsibility absent a showing of fraud or allegations that definitive responsibility criteria in the solicitation were not met (neither of these circumstances is present here); also, we do not review the adequacy of a contractor's performance since contract administration is the function of the contracting agency. See, generally, ENSEC Service Corporation, 55 Comp. Gen. 494 (1975), 75-2 CPD 341 and decisions discussed therein.

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For the above reasons, we see no basis for objection to award to ALM under IFB -1919.

IFB -3243

While the facts of this solicitation and IFB -1919 are nearly identical, DLA has concurred in the contracting officer's position that there is a compelling reason to cancel this IFB and resolicit using the revised specifications. DLA's reasoning is that the low bid, Dispenza's, was nonresponsive and that ALM's bid, while responsive, was unreasonably high-priced under the circumstances. In support of this position, DLA cites 49 Comp. Gen. 211, supra, where we stated:

"* * * the primary consideration in this type of situation should be the cost to the Government in the event of an award under the initial solicitation. Since adequate competition was obtained in this case, since the difference between the two low bids is relatively small, and since there is no evidence to indicate that the requirement for wire of 200 ratio precluded other potential bidders from submitting responsive bids, we believe that the circumstances require an award under the initial solicitation."

Applying this reasoning to the factual situation in connection with IFB -3243, DLA's October 20, 1976, report concludes:

"Here, although there may be other potential bidders to supply ironers of the type solicited, there is no evidence to indicate that the hand crank requirement prevented them from submitting responsive bids. Clearly, the difference between the two bids is not small: [Dispenza: \$79,797, ALM: \$92,223] * * *. The hand crank is not a costly item. Therefore, the cost to the Government of finding Dispenza nonresponsive and making award to American Laundry under -3243 is indeed substantial, \$12,426. Under these circumstances, cancellation and resolicitation would not be prejudicial to Dispenza who was non-responsive nor to American Laundry, whose significantly higher bid did not result from its attempt to be responsive to the hand crank requirement."

Neither Dispenza nor ALM commented on this rationale for canceling the solicitation. Dispenza does, however, contest the finding that its bid was nonresponsive, and that determination is necessary to support DLA's position. Dispenza argues that even though it stated that it could not supply the required hand crank, its bid was responsive because the crank was later found to be nonessential.

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The contracting officer, however, found Dispenza nonresponsive to the IFB because it stated that it could not offer an ironer with a hand crank. The contracting officer stated that Dispenza materially qualified its bids, and cited B-167585, April 29, 1970, as supporting determination that Dispenza was nonresponsive. In that case, the bidder found to be nonresponsive offered nylon webbing in lieu of the specified polyester webbing. The facts of that case, however, render it inapposite to the instant case. There, the requirement "represented a substantial part of the cost of the contract," while in the instant case the cost of the hand crank appears to be negligible. Also, in B-167585 the specification was material and was never found to be nonessential, while in the present case the specification was found to be nonessential. Therefore, B-167585 does not support a determination of nonresponsiveness in the instant case.

In DLA's report of October 20, 1976, on these protests, its Assistant Counsel concurred in the contracting officer's determination that Dispenza was nonresponsive, and cited B-155827, February 25, 1965, as supporting this result. While in that case a relatively minor deviation from specifications, in terms of cost, resulted in a determination of nonresponsiveness, the item specified was found to be "necessary in certain instances" to meet the Government's needs. In the instant case, however, the hand crank was found to be totally nonessential, and has not been shown to have other than a de minimus effect on price or quality. Therefore, we feel that B-155827 also is not controlling in the instant case.

Our decision in GAF Corporation, 53 Comp. Gen. 586 (1974), 74-1 CPD 68, involving an IFB issued for radiographic film, is factually similar to the instant case. The IFB included a specification requiring that the film " * * * consist of a transparent blue-tinted polyester base * * *," and further stated that " * * * [a] clear base shall not be acceptable." Upon testing, it was discovered that GAF's offered film did not comply with this requirement, as it used a different design approach. DLA, the procuring agency, also determined that the GAF film did meet the functional needs of the Government equally as well as film which complied with the specification. DLA consequently determined that GAF was nonresponsive, that the specification was inadequate or ambiguous and that the IFB should be canceled pursuant to ASPR § 2-404.1(b)(1) and resolicited with the specification revised to permit both film designs.

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Our Office recommended reinstatement of the IFB, with award to be made to GAF, the low responsive responsible bidder. We stated at 53 Comp. Gen. 592:

"[T]he responsiveness of GAF's bid on its HR 2000 film depends on whether the film as offered conforms to the essential requirements of the invitation. * * *."
See also 52 Comp. Gen. 285, 289 (1972).

We stated further that:

"* * * The product offered by GAF met all of the essential performance characteristics and requirements. * * *. The only shortcoming of the * * * film was that it failed to meet the blue-tinted base requirement. This requirement, however was a design requirement which * * * was neither essential to meet the Government's actual needs, nor was it proper to use a design criteria." 53 Comp. Gen. 586, 591 (1974).

In the present case, Natick determined that the hand crank was not an essential requirement. Since Dispenza's ironers appear to satisfy all of the essential requirements of the invitation and the actual needs of the Government while ALM's bid has been found to be unreasonable as to price, Dispenza's bid under IFB -3243 may be accepted.


In a letter filed in our Office on March 16, 1976, Dispenza complains of biased testing of its ironers procured by the VA under purchase order 75-MC-2011. In a previous decision (Charles J. Dispenza & Associates, B-183131, April 16, 1975, 75-1 CPD 229) involving the same procurement we considered Dispenza's complaint that VA quality tests might be "sabotaged." In that decision, we stated:

"The establishment of qualification and testing procedures is a matter of specification preparation and is also a matter within the ambit of the expertise of the cognizant technical activity. 52 Comp. Gen. 778 (1973); B-172901, B-173039, B-173087, November 14, 1971; B-173196, B-174035, December 8, 1971. Since Dispenza

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has presented no information that disputes the reasonableness of the quality test procedure, there is no basis for our Office to question the test procedure. The opportunity afforded Dispenza to attend the actual test at each installation and comment thereon, should suffice to assuage its fears that its results will be sabotaged."

Dispenza did not request reconsideration of this decision. Also, Dispenza has not alleged that it was denied an opportunity to attend the tests and comment on them. In any event, the disagreement between Dispenza and VA appears to be a matter of contract administration, and we do not believe it is properly for consideration in connection with the instant protest.


Deputy Comptroller General
of the United States